IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY 1996 SESSION

FILED

February 29, 1996

Cecil W. Crowson
Appellate Court Clerk

STATE OF TENNESSEE,	)	
	)	
Appellee,	)	No. 01C01-9507-CR-00226
	)	
	)	Davidson County
v.	)	
	)	Hon. J. Randall Wyatt, Jr., Judge
	)	
TREANOUS L. DAVIS,	)	(Attempt to commit second degree murder;
	)	attempt to commit aggravated robbery)
Appellant.	)	

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OPINION FILED:_____

AFFIRMED

Joseph M. Tipton
Judge

O P I N I O N

The defendant, Treanous L. Davis, was convicted in a jury trial in the Davidson County Criminal Court of attempt to commit second degree murder, a Class B felony, and attempt to commit aggravated robbery, a Class C felony. As a Range II, multiple offender, he was sentenced to seventeen years for the attempted murder and eight years for the attempted robbery with the sentences to be served consecutively. The defendant appeals as of right contending that the evidence was insufficient to prove that he was the assailant, that the evidence was insufficient to prove the offense of attempted aggravated robbery, and that the trial court erred in enhancing his sentences above the minimum for the applicable range. We disagree with the defendant's claims and affirm the trial court.

The defendant was tried for an assault upon Ms. Mildred G. James on December 9, 1993. The victim testified that she arrived at home on that day around 7:00 p.m. She said that as she approached her house, she noticed two automobiles driving behind her -- one a red and white Cadillac and the other a large, older, four-door green car that she first thought was also a Cadillac. She stated that she backed her car into the driveway and saw the Cadillac drive by. It turned around and was approaching her house when it and the green car stopped beside each other. She said that she did not see who was in either car.

The victim testified that both cars then moved out of her sight, but she could still hear motors running. She said that she got out her house keys, gathered her purse, umbrella, and other items and stepped out of her car. She said that the area was illuminated by two porch lights, a flood light, and an utility service pole light. It was raining and she opened her umbrella.

The victim testified that she heard someone running, looked up and saw the defendant standing in front of her with a gun. He held the gun in her face and told her to put up her hands. She said that the gun was two or three inches from her face. She also stated that she could see the defendant's face very clearly in the light and noted that he was wearing a large blue starter jacket and a wool toboggan. She stated that she started crying and screaming, which she continued even though the defendant kept telling her to shut up. She said she was terrified and thought he was going to kill her. In any event, she put up her hands, while holding her purse and a tote bag. She said several minutes passed before the defendant turned and ran. She said that the defendant stopped and shot at her, with the bullet lodging in her car. She said that the defendant ran across her yard and disappeared and she then heard the cars drive away. She said that she gave a police officer the description of the individual and the two cars.

The victim further testified that a week or two later, she saw the green car in traffic and recognized the driver as the man who tried to rob her. She saw the car a few days later and obtained the license plate number. She stated that she gave the number to the police and was later shown a series of photographs from which she picked out the defendant. It was only then that she learned that the green car was a Buick. She identified the defendant in the courtroom as the person who pulled the gun on her and who was in the police photograph she had selected. She said that she was certain that the defendant was her assailant.

Metro Police Officer David Lane testified about investigating the victim's assault on the night in question. He said that the victim gave him a description of the individual and that he saw the bullet hole in her car. Detective Bill Stroud testified that he determined that the license plate number the victim reported was registered to a 1973 Buick that was registered to Treanous Davis. He said he prepared a

photographic lineup for the victim to view and that she identified the defendant, although he acknowledged that she said that it looked like him, but that his hair is longer.

The only witness for the defendant was Tammy Denise Hawkins. Ms. Hawkins testified that she dated the defendant and that he happened to be with her on December 9, 1993, around 6:00 p.m. She stated that the two of them went out and made different stops. She said that he stayed at her place until approximately 9:30 or 10:00 o'clock.

I

The defendant contends that the evidence was insufficient to identify him as the victim's assailant and insufficient to show that he attempted a robbery in that there was no evidence that he asked for anything. Our standard of review when the sufficiency of the evidence is questioned on appeal is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979). This means that we may not reweigh the evidence, but must presume that the jury has resolved all conflicts in the testimony and drawn all reasonable inferences from the evidence in favor of the state. See State v. Sheffield, 676 S.W.2d 542, 547 (Tenn. 1984); State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Also, the identity of the defendant as the perpetrator was a question of fact for determination by the jury. State v. Strickland, 885 S.W.2d 85, 87 (Tenn. Crim. App. 1993), app. denied (Tenn. 1994). In this regard, the victim testified that her assailant was the defendant. He was within a few feet of the victim and she saw his face clearly. This evidence is sufficient to justify the guilty verdicts.

As for the defendant's claim that the evidence does not show that he attempted to rob the victim, we believe the guilty verdict was appropriate. An aggravated robbery is "the intentional or knowing theft of property from the person of another by violence or putting the person in fear," being accomplished with a deadly weapon. T.C.A. §§ 39-13-401, -402(a). Pursuant to T.C.A. § 39-12-101(a), a criminal attempt is provided as follows:

> A person commits attempt who, acting with the kind of culpability otherwise required for the offense:
>
> (1) Intentionally engages an action or causes a result that would constitute an offense if the circumstances surrounding the conduct were as the person believes them to be;
>
> (2) Acts with intent to cause a result that is an element of the offense, and believes the conduct will cause the result without further conduct on the person's part; or
>
> (3) Acts with intent to complete a course of action or cause a result that would constitute the offense, under the circumstances surrounding the conduct as the person believes them to be, and the conduct constitutes a substantial step toward the commission of the offense.

The defendant confronted the victim with a gun. The victim was outside her home, carrying her purse and other goods. The defendant only turned and fled after she would not stop screaming. Although the defendant made no demand for any of the victim's property, such is not required to prove the existence of a robbery. See Burnette v. State, 596 S.W.2d 839 (Tenn. Crim. App. 1979). The circumstances surrounding the assault easily justify a conclusion beyond a reasonable doubt that the defendant intended to rob the victim, but was only thwarted by her screaming. The evidence was sufficient to convict the defendant of both attempted second degree murder and attempted aggravated robbery.

II

The defendant contends that the trial court erred by giving him mid-Range II sentences. He contends that he should have been sentenced to six years for the attempted aggravated robbery and twelve years for the attempted second degree murder, the minimum sentences for those offenses under his Range II status.

The sentence to be imposed by the trial court is presumptively the minimum in the range unless there are enhancement factors present. T.C.A. § 40-35-210(c). Procedurally, the trial court is to increase the sentence within the range based upon the existence of enhancement factors and, then, reduce the sentence as appropriate for any mitigating factors. T.C.A. § 40-35-210(d) and (e). The weight to be afforded an existing factor is left to the trial court's discretion so long as it complies with the purposes and principles of the 1989 Sentencing Act and its findings are adequately supported by the record. T.C.A. § 40-35-210, Sentencing Commission Comments; State v. Moss, 727 S.W.2d 229, 237 (Tenn. 1986); see State v. Ashby, 823 S.W.2d 166, 169 (Tenn. 1991).

Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. T.C.A. §§ 40-35-401(d) and -402(d). As the Sentencing Commission Comments to these sections note, the burden is now on the appealing party to show that the sentence is improper. This means that if the trial court in this case followed the statutory sentencing procedure, made findings of fact which are adequately supported in the record, and gave due consideration and proper application of the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentences even if a different result were preferred. See State v. Fletcher, 805 S.W.2d 785, 789 (Tenn. Crim. App. 1991). However, "the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial

court considered the sentencing principles and all relevant facts and circumstances." Ashby, 823 S.W.2d at 169. In this respect, the trial court is obligated to preserve in the record the factors it found to apply and the specific findings of fact upon which it applied the sentencing principles in arriving at the sentences. See T.C.A. §§ 40-35-209(c) and -210(f).

In this vein, we note that the record is somewhat unclear regarding what was actually used by the trial court to enhance the sentences. The trial court stated that it was applying enhancement factors contained in T.C.A. § 40-35-114(10), commission of offense when the risk to life was high, and (16), commission of offense under circumstances in which potential for bodily injury to a victim was great. However, it also indicated that although the presentence report reflected a number of cases in which the charges had been dismissed against the defendant, it believed that the report showed "definite criminal behavior." Further, it noted that the offenses were committed while the defendant was on bail for other felony offenses of which he had been convicted. See T.C.A. § 40-35-114(13)(A). However, the trial court's reference to this factor was only in the context of it justifying consecutive sentences under Rule 32(c)(3), Tenn. R. Crim. P.

The presentence report reflects that at the time of sentencing, the defendant was a twenty-year-old, single, high school dropout who had very little gainful employment. He told the presentence officer that he had been placed on "juvenile probation," but the reason is not in the record. Also, the report contains over two pages of arrest history, but almost all of the charges are shown to have been dismissed or retired. There are two felony drug convictions received in November 1993 that justify the defendant's Range II status. Otherwise, the report reflects a trespass and misdemeanor drug convictions.

The state asserts that all of the above factors apply and adds the defendant's use of a firearm during the commission of the offenses as an additional factor. See T.C.A. § 40-35-114(9). However, substantial case law refutes much of the state's and trial court's positions.

The trial court cannot rely upon mere arrests as evidence of criminal history or behavior. State v. Newsome, 798 S.W.2d 542, 543 (Tenn. Crim. App.), app. denied (Tenn. 1990). However, the defendant's trespass and misdemeanor drug convictions can be considered in support of the application of factor (1). Therefore, the defendant's criminal history can be considered as enhancement for both the attempted second degree murder and the attempted aggravated robbery sentences.

Given the fact that the defendant's attempted aggravated robbery charge stems from his use of a deadly weapon, the weapon cannot be used to enhance the sentence for that offense further. State v. Roger Cordell Stewart, No. 01C01-9102-CR-00342, Macon Co., slip op. at 5 (Tenn. Crim. App. Aug. 30, 1991). However, the use of a deadly weapon can be used as enhancement for the attempted second degree murder charge because it is not an essential element of the offense. See State v. Butler, 900 S.W.2d 305, 312-13 (Tenn. Crim. App. 1994).

We also conclude that the sentences should be enhanced because the offenses were committed while the defendant was released on bail for other felony offenses for which he was ultimately convicted. T.C.A. § 40-35-114(13)(A). The defendant was released on bail for the purpose of getting his affairs in order before being confined on his sentences for his prior drug convictions when the present offenses were committed. This factor weighs heavily as enhancement of the defendant's sentences.

Relative to factors (10) and (16), we hold that they cannot be used to enhance the sentence for attempted second degree murder. It is obvious that a high risk to life and the great potential for bodily injury exist for every attempted murder. See State v. Makoka, 885 S.W.2d 366, 373 (Tenn. Crim. App.) app. denied (Tenn. 1994) (factor (10) not applicable to attempted murder unless persons other than victim are present).

Regarding the attempted aggravated robbery, we note that this court has consistently held that enhancement factors (10) and (16) are present in any case in which the offense is accomplished with a deadly weapon, such as, an aggravated robbery. See State v. Claybrooks, 910 S.W.2d 868, 872-73 (Tenn. Crim. App. 1994), app. denied (Tenn. 1995); State v. Hill, 885 S.W.2d 357, 363 (Tenn. Crim. App.), app. denied (Tenn. 1994); State v. Hicks, 868 S.W.2d 729, 732 (Tenn. Crim. App. 1993). We note, as well, that in State v. Jones, 883 S.W.2d 597, 602-603 (Tenn. 1994), our supreme court indicated that if an enhancement factor is necessarily inherent in or an element of an offense, it should not be applied regardless of how aggravated the existing circumstances relating to that factor are. That is, our strict application of the analysis in Jones to the present case could lead to the conclusion that factors (10) and (16) would not apply even though the defendant fired his weapon, a violent act not needed to prove an attempted aggravated robbery.

On the other hand, this court has applied factors (10) and (16) when the evidence has shown harmful or physically threatening conduct that is clearly above and beyond that necessary to prove the underlying offense. See, e.g., Manning v. State, 883 S.W.2d 635, 640 (Tenn. Crim. App. 1994); State v. Richard J. Crossman, No. 01C01-9311-CR-00394, Wilson Co. (Tenn. Crim. App. Oct. 6, 1994), app. denied (Tenn. Jan. 3, 1995). In this sense, we question for sentencing enhancement purposes whether we must ignore the fact that the defendant gratuitously shot at the

victim while leaving the scene. In any event, though, the applicability of these factors is not critical to our decision in this case, because we believe that the remaining factors support the trial court's sentences.

In this respect, we conclude that enhancement factors (1), regarding criminal history, (9), regarding use of a deadly weapon, and (13)(A), regarding the commission of a felony while on bail for a felony for which a conviction is obtained, apply to the attempted second degree murder offense. Also, we conclude that enhancement factors (1) and (13)(A) apply to the attempted aggravated robbery offense. The record reflects that the defendant exhibits little potential for rehabilitation while it also shows his bold disregard for obeying the law. Accordingly, we hold that the sentences of seventeen years for the attempted second degree murder and eight years for the attempted aggravated robbery conviction and their consecutive nature remain appropriate.

In consideration of the foregoing, the judgments of conviction are affirmed.

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Joseph M. Tipton, Judge

CONCUR:

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Paul G. Summers, Judge

_____
David H. Welles, Judge